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No. 89-1862

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1989

Daniel J. McCarthy, ***Petitioner,***

v.

Roulette Blair, ***Respondent.***

On Writ of Certiorari
to the Ninth Circuit Court of Appeals

SUGGESTION OF MOOTNESS

JOHN K. VAN DE KAMP
Attorney General of the State of California
RICHARD B. IGLEHART
Chief Assistant Attorney General
EDWARD T. FOGEL, JR.
Assistant Attorney General
*DONALD E. DE NICOLA
Deputy Attorney General
3580 Wilshire Boulevard
Los Angeles, California 90010
Telephone: (213) 736-2190
Attorneys for Petitioner
*Counsel of Record

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Petitioner Daniel J. McCarthy, Director of the California Department of Corrections, is constrained to file this memorandum to advise the Court of facts that arguably render this case moot.

The case at bar arose from the *habeas corpus* claim of respondent Roulette Blair that his post-prison period of state parole in California was unenforceable because he had not been informed, at the time he pleaded "guilty" to the underlying criminal offense, that post-prison parole was mandatory under California state law. The federal district court granted *habeas* relief, and the Court of Appeals for the Ninth Circuit affirmed on the ground that California had violated its own statute in failing to apprise respondent of the mandatory parole period and that the state's violation of its own law had prejudiced him. On October 1, 1990, this Court granted petitioner McCarthy's petition for writ of certiorari. The questions presented in that petition were: (1) "Whether the Court of Appeals for the Ninth Circuit has improperly and unduly expanded the scope of federal

habeas corpus relief by granting federal collateral relief in the absence of any federal violation based solely on an alleged violation of a *state* procedural rule plus a finding that it is 'reasonably probable' a different result would have occurred in the absence of the error of *state* law"; and (2) "Whether a federal court can avoid the clear limitation on retroactive application of new federal rules, by choosing to recast the issue in terms of a 'violation of state law plus prejudice,' which can be claimed in almost any federal habeas petition."

On October 12, petitioner's counsel was informed by state prison officials that respondent Blair now has been sentenced to a new state prison term because of a new burglary conviction. Under state law, respondent's prior post-prison parole period -- the parole period challenged in this *habeas* case -- was terminated automatically upon his reception into prison pursuant to the new criminal judgment and sentence. Since petitioner in this *habeas* case had sought only relief from the post-prison parole term stemming from his earlier conviction, and had not sought the setting aside of the underlying criminal conviction obtained by his "guilty" plea, the termination of the contested parole period ordinarily would render this case moot under this Court's decision in *Lane* v. *Williams*, 455 U.S. 624 (1982). In *Williams*, this Court dismissed as moot a state prisoner's similar challenge, limited to the validity of a post-prison parole period alone, because the challenged parole term had expired of its own force in the meantime.

Additional facts bearing on the mootness question, however, distinguish this case from *Williams*. Here, unlike in *Williams*, respondent Blair has also filed a separate federal civil-rights action for money damages against the State of California, the California Department of Corrections, the California Attorney General, a Deputy Attorney General, and two of respondent's

former parole agents, for their allegedly "malicious" enforcement of the parole period challenged in this *habeas corpus* case. The civil suit is pending in the federal court for the central district of California under the name *Roulette Blair* v. *State of California, et al.* (No. CV-90-1535-RSWL(Tx)). The question of the validity of respondent's post-prison parole period thus remains a matter of consequence to respondent; for, if that parole period is held to be valid after all, the civil suit for damages allegedly caused by the enforcement of the parole should fail or be seriously undermined because of *res judicata* issue-preclusion, see *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313, 329 (1970), or because of *stare decisis*.

Petitioner thus retains "a substantal stake" in this Court's eventual determination of whether his parole term should be deemed unlawful. *Williams*, at 632. This Court has recognized that the existence of actual rather than speculative adverse collateral legal consequences caused by an earlier criminal conviction can preserve a challenge to that conviction from mootness. *E.g., Benton* v. *Maryland*, 395 U.S. 784, 790 (1968). And it has indicated that a claim for money damages may preserve a claim from mootness even after a concomitant request for injunctive or prospective relief might become ineffectual. *E.g., Powell* v. *McCormack*, 395 U.S. 486, 495-500. In effect, the underlying dispute about the validity of the parole term in this case still retains the elements of adverse collateral legal consequences and money damages; for, unlike the speculative or remote consequences asserted in *Williams*, 455 U.S. at 632-633 fn. 13, that dispute is at issue in the existing civil rights suit between respondent and the state defendants. Respondent Blair, it should be noted, has not sought dismissal of this *habeas* case on grounds of mootness, even though he was the prevailing party in the courts

below. If he did so, he would bear the "heavy burden" of proof on the issue of mootness. *County of Los Angeles* v. *Davis*, 440 U.S. 625, 631 (1979).

This Court, of course, might nevertheless dismiss this case as moot, despite the pendency of the respondent's civil suit, because the issue of the validity of the parole period still can be litigated in that suit rather than in this case. *See Oil Worker's Union* v. *Missouri*, 361 U.S. 363, 369-370 (1961); *American Book Company* v. *Kansas*, 193 U.S. 49, 51-52 (1903); cf. *Firefighters* v. *Stotts*, 467 U.S. 561, 571 (majority op.), 597-599 (dissenting op., Blackmun, J.). To do so, however, would undervalue the extent to which the Ninth Circuit opinion and any potential decision by this Court will approximate a declaratory judgment that might be set up in the civil suit, cf. *Supertire Engineering Co.* v. *McCorkle*, 416 U.S. 115, 122-124 (1973); and it would unecessarily treat as a question of mootness what more properly might be termed a question of appropriate forum, cf. *Powell* v. *McCormack*, *supra*, 395 U.S. at 500. Such an approach, moreover, would fail to take account of the impact upon the states and the impact upon petitioner McCarthy, as the state official in charge of the Department of Correction, in letting stand the published decision of the Ninth Circuit Court of Appeals in this case. That opinion, in petitioner's view, egregiously expanded the scope of *habeas* relief to cases involving mere violations of state law rather than federal, law. It thus significantly affects all *habeas* cases in the Circuit, whether they arise in the context of parole advisements or not. Because of that, the Ninth Circuit opinion poses a serious threat to the constitutional values of federalism and comity in federal-state relations.

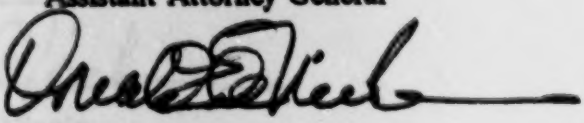
At the very least, any dismissal of this case on grounds of mootness should be accompanied by an order vacating the Ninth Circuit's opinion. As this Court has

stated: "When a claim is rendered moot while awaiting review by this Court, the judgment below should be vacated with directions to the District Court to dismiss the relevant portion of the complaint." *Deakins* v. *Monaghan*, — U.S. —, 108 S.Ct. 523 (1988). Vacating the decision of the court of appeals, indeed, was the very disposition endorsed by this Court when it dismissed the parole case in *Williams* as moot. 455 U.S. at 634.

Finally, respondent is aware of the need to continue to apprise the Court of the current status of the civil case; for, if the civil case terminates before a final decision by this Court, the characteristics that distinguish the *habeas* case at bar from the *Williams* case will disappear. Counsel for petitioner has determined, as of this date, that the state defendants in May 1990 moved to dismiss respondent's civil complaint, on statutory and constitutional grounds. The district court judge took the motion under submission in June 1990, without hearing argument. He has yet to rule on it.

Respectfully submitted,

JOHN K. VAN DE KAMP
Attorney General of the State of California
RICHARD B. IGLEHART
Chief Assistant Attorney General
EDWARD T. FOGEL, JR.
Assistant Attorney General



*DONALD E. DE NICOLA
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PROOF OF SERVICE

I, Donald E. de Nicola, a Member of the Bar of this Court, certify that on October 18, 1990, three copies of petitioner's accompanying Suggestion of Mootness in this case were mailed by depositing them in a United States Post Office mailbox, first-class postage prepaid, addressed to counsel for respondent Paul E. Potter, Esq., Potter & Cohen, 3852 East Colorado Boulevard, Pasadena, California, 91107 [(818) 795-0681]. I certify that service thus has been accomplished on all parties in compliance with this Court's Rule 29.

Donald E. de Nicola
Deputy Attorney General
3580 Wilshire Boulevard
Los Angeles, California 90010
(213) 736-2190
Counsel for Petitioner